

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

- - -

HONORABLE VIRGINIA A. PHILLIPS, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. EDCR 12-92 VAP
)
SOHIEL OMAR KABIR,)
RALPH KENNETH DELEON,)
)
)
Defendants.)
)

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

Riverside, California

Monday, June 9, 2014

9:46 a.m.

PHYLLIS A. PRESTON, CSR, FCRR
Federal Official Court Reporter
United States District Court
3470 Twelfth Street
Riverside, California 92501
(951) 205-7959
stenojag@aol.com

1 APPEARANCES:

2
3 For the Plaintiff:

4 OFFICE OF THE UNITED STATES ATTORNEY

By: **SUSAN DEWITT**

5 **CHRISTOPHER GRIGG**

ALLEN CHIU

6 Assistant United States Attorneys

3403 Tenth Street, Suite 200

7 Riverside, California 92501

8
9
10 For Defendant Kabir:

11 OFFICE OF THE FEDERAL PUBLIC DEFENDER

BY: **JEFFREY AARON**

12 **ANGELA VIRAMONTES**

Deputy Federal Public Defenders

13 3801 University Avenue, Suite 150

14 Riverside, California 92501

15
16 For Defendant DeLeon:

17 **DAVID J. THOMAS**

CJA Appointed Counsel

18 1500 Iowa Avenue, Suite 220

19 Riverside, California 92507

20

21

22

23

24

25

1 **MONDAY, JUNE 9, 2014; RIVERSIDE, CALIFORNIA**

2 -o0o-

3 THE CLERK: Item No. 2, EDCR 12-092 VAP, United
4 States of America v. Sohien Omar Kabir and Ralph Kenneth
5 DeLeon.

09:46

6 Counsel, please state your appearances.

7 MS. DEWITT: Good morning, Your Honor. Susan DeWitt
8 on behalf of the Government. Also present at counsel table
9 with me is Christopher Grigg and Allen Chiu.

10 THE COURT: Thank you. Good morning.

09:46

11 MR. GRIGG: Good morning, Your Honor.

12 MR. CHIU: Good morning.

13 MR. AARON: Good morning, Your Honor. Jeffrey Aaron
14 for the federal public defender for Mr. Sohien Kabir who is
15 present in custody. With me at counsel table is Ms. Angela
16 Viramontes.

09:47

17 THE COURT: Thank you. Good morning.

18 MR. THOMAS: Good morning, Your Honor. Dave Thomas
19 on behalf of Ralph DeLeon who is here and present with me at
20 counsel table.

09:47

21 THE COURT: Thank you. Good morning.

22 All right. There are three motions on calendar this
23 morning in this case. And we have distributed tentative
24 rulings on the motion to introduce at trial certain statements
25 by the defendant Ralph DeLeon; a tentative ruling on the

09:47

1 Government's motion to preclude evidence of an entrapment
2 defense; and I will take up -- there isn't a written tentative,
3 but I will take up the motion to exclude testimony of the
4 defendant's -- defendant Kabir's expert, Victoroff; and to
5 compel further disclosure as to Sageman.

09:47

6 Starting with the motion to introduce certain
7 statements given in a proffer session by defendant DeLeon,
8 deputy clerk Ms. Dillard, just handed me the amended joinder in
9 the opposition by Mr. DeLeon, which I had not seen; it hasn't
10 appeared on the docket. The only thing that's appeared on the
11 docket is the notice of manual filing. So I had not seen it
12 and had not seen the declaration of Mr. DeLeon.

09:48

13 But as you can see from the tentative ruling, the
14 original joinder by Mr. DeLeon -- although, I agree with the
15 Government's ex parte application that counsel's declaration,
16 strictly speaking, has to be stricken because it's hearsay, it
17 was sufficient, as I put it in the tentative, to alert the
18 Court that there was an issue, I thought, as to defendant
19 DeLeon's knowing, intelligent and voluntary waiver of his
20 rights with respect to Rule 410.

09:48

09:49

21 So the -- I mean, I've just very quickly read the
22 amended joinder.

23 The amended joinder appears to take the position that
24 there isn't so much an issue with respect to the
25 attorney/client privilege, and so on, but it's really just an

09:49

1 issue as to what Mr. DeLeon's understanding was. And again, I
2 think the defendant's position is somewhat the same as the
3 Court's, that given that there's an issue about that --
4 although, Mr. DeLeon's position seems to be that it's based on
5 what the Government's counsel or the agents told him during the 09:50
6 proffer session, more than perhaps what his former attorney,
7 Mr. Driggs, told him.

8 In any event, there needs to be probably a separate
9 hearing with -- again, I think, with respect to whether or not
10 there was a knowing, intelligent and voluntary waiver. 09:50

11 So, Mr. Thomas, do you want to be heard further on
12 that? And what is your proposal as to -- I am concerned about
13 -- well, there's a number of things to be concerned about:
14 Waiver of an attorney/client privilege and -- well, a number of
15 other issues. 09:50

16 So how do you propose that we deal with what happened
17 at the proffer session?

18 MR. THOMAS: Thank you, Your Honor.

19 For starters, I agree that we do need to have another
20 hearing on this issue. I would like to -- and Government 09:51
21 suggested this, as well -- wait for us to get the transcript
22 from Mr. DeLeon's removal of his prior counsel. I hadn't
23 gotten it. Although it's been approved, we just don't have it
24 yet, and I would like to review that and discuss that with my
25 client before the hearing. 09:51

1 What I have in mind for the hearing on the issue, I
2 understand the attorney/client issue, the waiver issue, is
3 present for that issue. I mean, I can't get into what my
4 client was told by his former counsel, without acknowledging
5 that those statements -- privilege is waived. That's just the 09:51
6 minor port of my argument, though. The larger portion of it
7 happened during the meeting with counsel present. There was --

8 THE COURT: You mean the proffer meeting?

9 MR. THOMAS: During the proffer meeting with
10 Government counsel present and my client's former counsel. 09:51
11 There's obviously no privilege with respect to that statement
12 because there were other parties present.

13 So my client and I discussed this extensively about
14 what went on during the meeting, what was represented to him by
15 the Government. It wasn't so much by his prior counsel; there 09:52
16 was very little from his prior counsel. It was more by the
17 Government and his understanding of what happened at that
18 meeting. My client -- we could conduct a limited evidentiary
19 hearing where my client takes the stand and answers the Court's
20 questions about that limited issue. 09:52

21 THE COURT: About the proffer session?

22 MR. THOMAS: Just about the proffer session and about
23 what was represented to him by the Government and/or his
24 counsel during and after the proffer.

25 THE COURT: Well, wouldn't we need to have Mr. Driggs 09:52

1 present?

2 MR. THOMAS: You know, yes, I believe so. I
3 specifically -- because of the strained nature of their
4 relationship, I've followed my counsel's advice on probably
5 that's not the best way to go with Mr. Driggs because I can't 09:52
6 -- you know, Mr. Driggs is understandably going to be in a
7 position to cover his own backside, for lack of a better term,
8 so I don't think that's the proper truth-telling function on
9 that issue. I think it's more my client's statement, which I
10 proffered and signed a declaration to, and he'll swear under 09:53
11 oath and tell the Court.

12 THE COURT: All right. Mr. Grigg?

13 MR. GRIGG: Thank you, Your Honor.

14 Your Honor, the attorney/client privilege is the
15 central issue here because the argument from defendant that, 09:53
16 well, what really matters is what he understood about the terms
17 governing his proffer session, which is what's at issue. So
18 far, nobody has contested the facts as recited in the 302 that
19 the Court has before it and Exhibit B to the Government's
20 motion. 09:53

21 The issue is what did DeLeon understand at the time
22 he began that proffer session? And in order to get to that
23 issue, we must, therefore, have information about what
24 information was provided to him, and that necessarily requires
25 an inquiry of Mr. Driggs. 09:54

1 I've spoken to Mr. Driggs by phone about this issue.
2 I've alerted him to the fact that counsel's declaration placed
3 this matter at issue.

4 And the Court is aware that we filed a couple of
5 pleadings, including the ex parte to strike, and held off on 09:54
6 asking the Court to make a final determination about this
7 depending on whether defendant DeLeon withdrew that argument
8 and those representations and, therefore, had the opportunity
9 to preserve his privilege under *Bittaker*.

10 He's decided not to do that. He's decided to press 09:54
11 the issue. And now with the declaration the Court has before
12 it, the Court can clearly see that his arguments about what he
13 understood about the letter agreement that he signed and that
14 his counsel signed that govern the terms of that proffer
15 session are now squarely at issue. And therefore, the Court 09:54
16 should act on the Government's ex parte application and find
17 that there has been a waiver -- a limited waiver, albeit -- but
18 for the purpose of understanding and seeking the truth about
19 what defendant DeLeon was told about the terms of his proffer.

20 In essence, where we are is, we've got a written 09:55
21 contract signed by DeLeon and signed by his counsel. It's
22 presumed, in a fundamental basis of contract law, that someone
23 has read and understood a document they are signing. It's hard
24 to get one's head around the idea that a defendant, who is
25 college educated and is being presented a written document in 09:55

1 his first meeting with prosecutors and agents since his arrest,
2 would not read the document that's placed in front of him in
3 the first instance, which is, of course, what he says.

4 Now, of course the Court has --

5 THE COURT: Wait a minute. Wait a minute. He says
6 he -- I'm not sure I understood that last sentence.

7 The defendant says he did not read the entire
8 document?

9 MR. GRIGG: That's what he says, Your Honor. And the
10 bottom line is --

11 THE COURT: That's not hard to believe.

12 MR. GRIGG: Your Honor, as the Court is aware --

13 THE COURT: Now, I'm not saying that legally that
14 absolves him of the consequences of signing it, but I just
15 don't find it hard to believe that someone doesn't read
16 everything, especially something that's pretty complex, like
17 that agreement.

18 MR. GRIGG: Well, Your Honor --

19 THE COURT: I mean, I can -- I hear that many times a
20 year in a civil context, in a criminal context. People sign
21 things without reading them, all of it. And that happens.
22 That doesn't mean that they are not bound by what they sign.

23 MR. GRIGG: Absolutely, Your Honor.

24 THE COURT: But it doesn't mean that they are being
25 untruthful when they say, *I didn't read it. I relied on what*

09:55

09:55

09:56

09:56

09:56

1 -- you know, *The escrow agent told me that it's all standard;*
2 *go ahead and sign it,* for example.

3 MR. GRIGG: Fair enough.

4 THE COURT: Which I probably have heard 100 times, if
5 not more.

09:57

6 MR. GRIGG: Here, we've got someone who is in a
7 situation, with the background the defendant has, having his
8 first meeting, having a letter agreement placed in front of
9 him. He also met with his counsel ten minutes to review the
10 letter, as was observed through the window at the conference
11 room, where counsel and he are going over the terms of the
12 letter. Of course, nobody is privy to what was said. And
13 that's all the more reason why his counsel and his counsel's
14 advice about the terms of the letter matters here. And that's
15 exactly why the Court should find --

09:57

09:57

16 THE COURT: As well as what Government counsel said.

17 MR. GRIGG: I'm sorry, Your Honor?

18 THE COURT: As well as what Government counsel said
19 to him during the proffer session.

20 MR. GRIGG: Yes, absolutely, Your Honor. And we
21 certainly want the opportunity to place all of this information
22 in front of the Court.

09:57

23 THE COURT: Exactly.

24 MR. GRIGG: And we intend to do that. But as a
25 component of all the information, a necessary piece of that is

09:57

1 what did Mr. Driggs tell Mr. DeLeon about the terms of the
2 letter when he was observed reviewing the letter before the
3 proffer session started?

4 And quite frankly, Your Honor, I'm not arguing that
5 someone is being deceitful, necessarily, about a particular 09:58
6 meeting. Because as the Court is aware, having read the
7 pleadings, there were two meetings with defendant DeLeon, one
8 that happened much later. This could be a simple case of
9 confusion and misrecollection about what happened at what
10 meeting. And that's why the input from Mr. Driggs is important 09:58
11 here. And the Government, like counsel, would like to see the
12 transcript from the August 2013 hearing and have the
13 opportunity to have Mr. Driggs freely engage in this limited
14 issue without fear of consequences for him and for the client.

15 And so the Court, I think, has more than enough at 09:58
16 this point before it to declare the waiver so that the
17 Government can reengage with Mr. Driggs and get to the
18 substance of what happened.

19 THE COURT: Well, I am inclined to declare a waiver,
20 but I want to be very specific about the limits on the waiver. 09:58
21 So I want to give that some further thought.

22 It's not a waiver of the entire privilege on the
23 entire relationship between Mr. DeLeon and Mr. Driggs, but it
24 -- and so it needs to be -- my order as to that waiver needs to
25 be -- I have to think about that some more. And I'm going to 09:59

1 put it in writing because it really relates only, I think, to
2 the proffer session, the discussions regarding the proffer
3 session.

4 MR. GRIGG: And Your Honor, within that, if the Court
5 in narrow detail -- obviously, we don't need to hear about how 09:59
6 much discovery was provided to DeLeon after he was arrested,
7 and so on, which are representations that were in counsel's
8 declaration, but if the Court can include, within the waiver,
9 the issues relating to the proffer session in April 2013 and
10 the meeting in July 2013 so that we can address both of those. 09:59
11 And if this is simply a case of DeLeon misrecollecting what
12 happened at which meeting, the Court will then have the ability
13 to make that assessment.

14 THE COURT: Let me just say -- let's go off the
15 record. Well, let's keep it on the record, that the court 10:00
16 reporter, I'm sure, will get that transcript to you right away.
17 There was a family emergency last week; otherwise, I think she
18 would have gotten it to you last week.

19 MR. GRIGG: Your Honor, if I may on that point?

20 The Court has not ordered that unsealed as to the 10:00
21 Government. The Court previously only ordered that unsealed as
22 to Mr. DeLeon.

23 THE COURT: Well, first, I'd have to find a waiver.
24 First, I have to sign a waiver order before you could receive
25 that. 10:00

1 MR. GRIGG: Right.

2 THE COURT: But thank you for reminding about that
3 point.

4 So I am going to hold off ruling on that motion until
5 we resolve this issue, which is I think what my tentative says, 10:00
6 that we can't resolve this. But I won't even issue this
7 ruling, I think, until we resolve the underlying issue of the
8 validity of the agreement.

9 MR. GRIGG: And the Government is -- completely
10 understands that approach. And just so I'm clear, the Court is 10:01
11 not going to hold off on deciding whether and to what extent
12 the waiver happened, and the Court will issue that order. And
13 then we will reengage on --

14 THE COURT: Oh, exactly, no. I need to get to that.
15 But as to whether or not the Government is going to be able to 10:01
16 introduce these statements at trial, I can't rule on that,
17 obviously, until I make a decision about whether the terms of
18 the proffer -- whether the proffer agreement is valid.

19 MR. GRIGG: And to a certain extent, Your Honor,
20 there is an overlap between the other motion for which the 10:01
21 Court has issued a tentative stay. That's the entrapment
22 motion. Because as the Court is aware, counsel has provided a
23 narrative of defendant's version of the facts. And I'm sure
24 the Court has looked at the proffer statement, and those are
25 not consistent with each other. They make diametrically 10:02

1 opposed representations of time. And so --

2 THE COURT: Well, let me ask this: Is the
3 Government's -- actually, there is a couple of -- well, before
4 we move on to the entrapment motion, in terms of timing for a
5 hearing -- and I think there's a question about whether counsel 10:02
6 for Kabir could be present at that hearing because it depends
7 on the extent of the waiver. But let's -- I would like to have
8 that hearing, at which Mr. Driggs would, I believe, have to be
9 present as well, I would like to have it perhaps later this
10 week. Let me think. 10:02

11 So maybe -- okay. So Thursday of this week is
12 available. So check your calendars. We'll come back to that
13 at the end of the hearing today.

14 So moving on to the entrapment motion -- well,
15 Mr. Grigg, you were referring to -- well, the Government in the 10:03
16 entrapment motion, and I think mostly in the moving papers, to
17 a certain extent in the reply, a couple of times has listed
18 either a narrative or point-by-point evidence, and sometimes it
19 cites to the Complaint or even the Second Superseding
20 Indictment; sometimes it doesn't have a cite as to the source 10:04
21 of the facts. Does that mean that sometimes are you referring
22 to that as something where the source is Mr. DeLeon's proffer?

23 MR. GRIGG: Your Honor, if I may?

24 I didn't mean to take over the argument for the
25 entrapment motion; Ms. DeWitt will handle that. But I just 10:04

1 meant to point out that they are interrelated. And if it's
2 okay with the Court, Ms. DeWitt will address that issue.

3 THE COURT: All right. So as you can see from my
4 written tentative, while I appreciate getting a preview of --
5 and that's not facetious. I spent a lot of time on this 10:05
6 motion, and I appreciate getting a preview of both sides' views
7 on this issue. But I don't think it would be appropriate to
8 rule at this time that the defense is not entitled to an
9 instruction on entrapment. I think, based on what both sides
10 have proffered at this point, that the defense, especially as 10:05
11 to the predisposition element but as to both elements, may not
12 even meet the very low standard of -- you know, the evidence
13 may be weak. But it's certainly not to the level where I feel
14 that it would be appropriate to issue an order that they can't
15 introduce what evidence they have. 10:06

16 I think it would be argument for either side, but of
17 course it would be the defense who would probably say this, to
18 say in opening statement, that there's been entrapment.

19 I have a pretty vigilant standard for argument and
20 opening statement, and so I think both sides should be telling 10:06
21 their story to the jury of what they think the evidence will
22 be. And so I don't think either side should use the word
23 *entrapped* during their opening statement, or a synonym for it.

24 But certainly the defense can, in their opening
25 statement, present their view of the evidence to the jury, 10:06

1 including the evidence that they think will eventually lead to
2 their request for an entrapment instruction.

3 All right. Ms. DeWitt.

4 Ms. DEWITT: First, just to answer the question that
5 you posed to Mr. Grigg.

10:07

6 The papers that the Government submitted in support
7 of this motion and its reply, other than citing the fact of the
8 charges, everything -- every cite in there is to specific
9 evidence that's laid out and sworn to by an agent in the
10 Complaint. So it's not --

10:07

11 THE COURT: Okay. I've reviewed the Complaint
12 several times. Because as you can see from the tentative, I
13 could find a cite in the Complaint for almost everything that
14 the Government referred to.

15 MS. DEWITT: So to get your -- to get to your, I
16 think, to your secondary point was, what, were we in any way
17 relying on our proffer statement? No.

10:07

18 THE COURT: All right.

19 MS. DEWITT: But, Your Honor, by taking the position
20 that the defendant has in his opposition, it's the Government's
21 position that in this motion itself he has now put his proffer
22 statement at issue.

10:07

23 So this is not -- I mean, he's not allowed to take
24 contrary views to his proffer statement in proceedings before
25 trial. So this isn't just an issue for trial.

10:08

1 And, Your Honor, you know, I recognize that you
2 haven't made an ultimate decision about the proffer statement,
3 and I also recognize that defense counsel often -- defendants
4 often take different positions at trial and different theories.
5 But what they're not allowed to do is to submit oppositions
6 that are absolutely unsupported, not only by any evidence,
7 which is the case here, but also the --

10:08

8 THE COURT: Are you talking about the entrapment
9 motion?

10 MS. DEWITT: Yes.

10:08

11 And frankly, they're not given a blank slate. They
12 don't get to just ignore the fact. I mean, maybe at the end of
13 the day the Court will say they are not stuck with us being
14 able to use his own statements which he admits and doesn't
15 contest are true in his proffer statement, but that doesn't
16 mean he gets to come into court and say the exact opposite. He
17 isn't given a blank slate to just make up a story. And that's
18 the problem that we're faced with here, is that this motion is
19 based not only on nothing, but a made-up story. But it is
20 directly in contradiction to his own words.

10:08

10:09

21 THE COURT: When you say *this motion*, you mean this
22 defense?

23 MS. DEWITT: It's his opposition to the motion, Your
24 Honor.

25 THE COURT: All right. I'm sorry.

10:09

1 MS. DEWITT: So one, we are now in a position where
2 there is no evidence in support of his opposition to this
3 motion. That evidence directly puts his proffer statement at
4 issue in this particular motion.

5 And then we get to the third point, which is the 10:09
6 Court sort of -- the Court is now -- okay. I agree with the
7 conclusions of the Court, but what is the remedy?

8 So let me take it one by one.

9 The first issue relates to Mr. Kabir. The Court has
10 already concluded, based on the evidence here, that he is not 10:09
11 entitled to an entrapment defense because there is no
12 derivative entrapment as a matter of law, but that you will --
13 essentially, you will let evidence in.

14 Well, my question to the Court is, because I'm
15 confused here is -- 10:10

16 THE COURT: You need to slow down. Speak more
17 slowly.

18 MS. DEWITT: I'm sorry.

19 My question to this Court is, given the facts that
20 are undisputed as to when Mr. Kabir first had any contact at 10:10
21 all with the confidential source here, what evidence -- and
22 anything else would be derivative entrapment -- what evidence
23 could Mr. Kabir admit at trial that wouldn't otherwise be
24 impermissible as a matter of law?

25 So the question becomes -- the remedy here, with 10:10

1 respect to Mr. Kabir is, it should be that there is nothing he
2 should be able to admit -- even at trial on this issue --
3 because it would all be precluded as a matter of law.

4 Now, with respect to Mr. DeLeon --

5 THE COURT: Well, let's talk about Mr. Kabir a little 10:10
6 further.

7 If you look at just the timing of it, Mr. Kabir's
8 first interaction with the confidential source begins during a
9 phone -- a Skype conversation, and I believe it was August --

10 MS. DEWITT: 31st. 10:11

11 THE COURT: -- 31st. So the only contacts are from
12 that day -- between direct contacts between Mr. Kabir and the
13 confidential source are from that day forward until his arrest
14 in November. So that's a period of maybe two months, two
15 months and ten days, something like that. So that evidence is 10:11
16 limited to that period.

17 And during that period, and in those Skype
18 conversations, at most, the evidence would be the confidential
19 source saying things during his -- during the confidential
20 source's conversations with Mr. Kabir and other -- the other 10:12
21 defendants in this case, giving this the construction in favor
22 of the defense.

23 The confidential source saying things like, *I can*
24 *assist with getting the passports or the visas. I can assist*
25 *with maybe loaning some money.* 10:12

1 I don't think the defense even set -- I think the
2 defense says that the airfare for one of the three
3 co-defendants, not Mr. Kabir, was paid for by a credit card of
4 the confidential source. And that's about the extent of it, as
5 I recall. I'm sure Mr. Aaron or Ms. Viramontes will correct
6 me, but it's those conversations. 10:13

7 MS. DEWITT: I would submit, Your Honor, that the
8 conversations that the CHS was engaged in, however you want to
9 characterize them as in terms of their substance or their
10 extent, which we would submit was extremely limited, but those 10:13
11 are fair game. There's no -- I don't have any dispute about
12 that. But all the other things that you're pointing to, as far
13 as Mr. Kabir is concerned, they're irrelevant because they
14 would go, at most, to -- even if you accept them as true --
15 would go to an entrapment with a derivative entrapment defense. 10:13

16 THE COURT: Everything before August 31st, correct?

17 MS. DEWITT: Everything before August 31st and,
18 frankly, anything in the United States where he is not present.
19 He's in Afghanistan at this point. So anything that the CHS is
20 doing with the other co-conspirators, that is -- that is true 10:13
21 derivative entrapment, however you want to be --

22 THE COURT: Well, wouldn't you say -- I mean, the
23 fact that the other defendants are on the telephone -- I'm
24 calling it *telephone*, but on the Skype call -- the fact that
25 they're on the call and he's in Afghanistan doesn't mean that 10:14

1 there's not a pos -- that doesn't make it derivative. If he's
2 on the phone call and he's having contact with the -- he
3 meaning Mr. Kabir -- was having contact with the CS, that
4 doesn't -- I mean, it's not derivative just because one's in
5 Afghanistan and they're Skyping.

10:14

6 MS. DEWITT: To the extent that that comment is made
7 to Mr. Kabir by the CS while he's on the phone, I agree that
8 that's fair game.

9 THE COURT: All right.

10 MS. DEWITT: What that means, what the significance
11 of that is, is a different issue. What happens outside the
12 presence of those calls, his actions, his interactions, et
13 cetera, that all is --

10:14

14 THE COURT: *His* meaning the CS or Kabir?

15 MS. DEWITT: Anything that happens where it's outside
16 the presence of Mr. Kabir has to be derivative and, therefore,
17 should not be admissible from Mr. Kabir.

10:15

18 There may be some argument that some of that's
19 admissible as to Mr. DeLeon, but we can get to that in a
20 minute.

10:15

21 But as to Mr. Kabir, in order to be induced, he has
22 to be induced by a government actor. So it has to be something
23 that was said or done to him because he's not in the United
24 States. It can't be done with him. It has to be done by way
25 of Skype calls or other communications, which there aren't in

10:15

1 this case. So the only thing that Mr. Kabir, at most, should
2 be allowed to introduce that might even arguably go to
3 entrapment would be those conversations.

4 THE COURT: All right. Before we move on to
5 Mr. DeLeon, although we've touched on that, let me let
6 Mr. Kabir's counsel respond.

7 MR. AARON: Everything counsel is saying would be
8 fine if she were also saying evidence of acts and statements
9 before August, when Mr. Kabir was on the Skype call with the
10 confidential human source or the informant, everything before
11 then would not be admitted against him.

12 But what the Government is trying to do is to have
13 its cake and eat it too. It's trying to say, *Mr. Kabir, you*
14 *cannot challenge those statements. You cannot put on evidence*
15 *that they were a result of these young men, basically almost*
16 *teenagers, being entrapped. You can't put on evidence of that,*
17 *but that evidence can come in against you.*

18 In other words, the statements, the acts, everything
19 that the informant helped these men to do, instructed them to
20 do, and rewarded them for doing, that will come in against
21 Mr. Kabir, but he won't have any opportunity, if the Government
22 has its way, he won't have any opportunity of showing that to
23 the jury, or of combatting it. And I can't think of a greater
24 example of due process. The Government might as well just
25 exclude all of the defense witnesses at that point.

1 I can't think of any greater example of a due process
2 violation.

3 THE COURT: Well, aren't you -- let me make sure I
4 understand that argument, then.

5 If I understand -- if I understand you correctly,
6 what you're arguing is that the Government's position that the
7 statements of the defendants are admissible under the
8 co-conspirator exception to the rule against hearsay is somehow
9 implicated, that somehow should be voided by the application of
10 the entrapment defense?

10:17

10:18

11 MR. AARON: No, Your Honor.

12 What I'm saying is that we should be entitled to show
13 all of the facts and circumstances surrounding each of the
14 statements and each of the acts that are going to be attributed
15 to our client. And that results in us being able to show that
16 this was produced at the instigation of and with the guidance
17 of the informant. And in each instance, there are statements
18 that have nothing to do with the informant. There are acts
19 that have nothing to do with the informant. There are acts
20 that do. We should be entitled to show those.

10:18

10:18

21 And what the Government would prefer us to do is to
22 just sit there, be quiet, and not say anything until they
23 decide to bring up some evidence of August and -- August 2013,
24 2012, and later. Meanwhile, they would also be allowed to
25 bring in evidence of acts and statements before August.

10:18

1 So in other words, the Government is saying, *We want*
2 *to be able to bring in those acts and statements. We want*
3 *those to come in against Mr. Kabir and against Mr. DeLeon, but*
4 *we don't want Mr. Kabir's team to be able to say anything about*
5 *that or to challenge them in any way.*

10:19

6 And if the Court has any doubt about that, I think
7 the Court could ask the Government, and they would candidly
8 admit, yes, that's what they are trying to do.

9 THE COURT: Well, if your suggestion is that the
10 Court -- that the Government would prefer that the defense not
11 put on a case, I think they probably would prefer that. That's
12 not realistic.

10:19

13 But if what you're arguing is that, in part, you want
14 your right to put on an entrapment defense is to counter the
15 right of the Government to put on the statements of the
16 co-conspirators under that exception to the rule against
17 hearsay, that's not a reason to allow evidence of entrapment.

10:19

18 MR. AARON: That's not what I said, Your Honor, and
19 that's not what we're implying.

20 We're not saying that because we get to go into the
21 source and the genesis and the development of each of the acts
22 and statements, that we get to put on an entrapment defense.
23 That's not what we're saying.

10:20

24 THE COURT: Now I'm even more confused. I'm sorry.

25 When you say you want to put on evidence of the

10:20

1 genesis and the background, for what? I really am confused
2 about what you're trying to say.

3 MR. AARON: We want to show the jury where these
4 facts and statements and acts came from.

5 I believe that the Government's -- what the
6 Government's proposed relief will be, that the defense can talk
7 about, and they can question the informant about events that
8 happened after August but not about anything before.

10:20

9 So in other words --

10 THE COURT: As to your client.

10:20

11 MR. AARON: Right. As to our client.

12 But the truth is they will also try and admit acts
13 and statements before August of 2012, against him. So to admit
14 that evidence but not allow us to show, *Hey, this comes from*
15 *the informant. This was produced by the informant. This is*
16 *information that he gave, or that he distorted, or are funds*
17 *that he provided*, I think that deprives the defense of the
18 ability to defend Mr. Kabir against any of those acts or
19 statements that would come in under the co-conspirators
20 exception, for anything before August of 2012.

10:21

10:21

21 I think also that the Court and the prosecution is
22 making a fundamental misunderstanding.

23 There's a difference between saying, *Hey, this*
24 *witness, Witness A, is responsible for these things*, and a
25 difference between that and saying, *Because of that, we get*

10:21

1 *defense instructions of entrapment.*

2 We're not even talking about that now. We're talking
3 about showing to the jury why this evidence shouldn't be
4 trusted and why it is compromised.

5 THE COURT: Well, when you say why the evidence
6 shouldn't be trusted, by cross-examining the confidential
7 source on what issues?

10:21

8 MR. AARON: Any evidence that's produced they are
9 trying to use against Mr. Kabir. Any evidence. We intend to
10 cross-examine him vigorously on anything that they are
11 intending to use against Mr. Kabir.

10:22

12 If the informant says, *I took these gentlemen to do*
13 *paint ball in June, before they met Mr. Kabir,* and that's going
14 to be an overt act or an act which is admitted against
15 Mr. Kabir, we intend to cross-examine the informant at great
16 length about that.

10:22

17 And, Your Honor, the informant is not our witness, so
18 we do not have to provide Jencks as to him. But we have a lot
19 of information about the informant that is going to come in in
20 cross-examination.

10:22

21 THE COURT: All right. So cross-examining him, for
22 example, about the interactions that he had with the other
23 defendants before Mr. Kabir met him is, in your view, relevant
24 to what? His credibility?

25 MR. AARON: It's relevant to his credibility and it's

10:23

1 relevant to the strength of the evidence against Mr. Kabir
2 because we're entitled to argue that that evidence is not
3 sufficient beyond a reasonable doubt.

4 We're also entitled to argue that they have --

5 THE COURT: I'm sorry. That what evidence? 10:23

6 MR. AARON: The evidence that they're going to
7 produce from the informant.

8 THE COURT: Well, let's go with your example about
9 paint ball or going to the shooting ranges. Although, that may
10 have happened after September. Well, let's just -- either one 10:23
11 is fine. That evidence is, as I understand it, and maybe it's
12 offered for another reason as well, but it's being offered to
13 show that the defendants engaged in these training exercises to
14 show their intent to join the Taliban or Al-Qaeda when they got
15 to Afghanistan, among other things. 10:24

16 MR. AARON: Among other things.

17 THE COURT: All right. So if you're going to cross-
18 examine, which is a scheme that the Government intends to show
19 that Mr. Kabir was involved in --

20 MR. AARON: Correct. 10:24

21 THE COURT: -- you're going to cross-examine the
22 confidential source because you say it goes to his credibility
23 and as to what conversations he may have had with the
24 co-defendants as to what their intent really was?

25 MR. AARON: It goes to so much more than that, Your 10:24

1 Honor. It goes to the integrity of the conspiracy. It goes to
2 the making of the agreement. Let's just use -- Let's stick to
3 -- it's a made-up example, but just let's stick to that, if we
4 could for just a moment, of going to paint ball in June 2012.
5 The Government, let's say --

10:25

6 THE COURT: Well, that's not a made-up example.

7 MR. AARON: I'm not sure about the date, either.

8 That's why I'm saying it's a made-up example.

9 THE COURT: All right.

10 MR. AARON: The Government will argue this shows that
11 not only was there an agreement between them, but there was
12 agreement to do some sort of violent jihad or military-type
13 act.

10:25

14 What we would do, by cross-examining the informant
15 is, one, show that he's a liar; two, show that he planted the
16 idea, that it did not originate with the other defendants, nor
17 did it originate with Mr. Kabir.

10:25

18 If we show that, then the jury would have to say, All
19 right. That idea -- the jury could say, *We believe that those*
20 *gentlemen did engage in a paint ball afternoon. But we also*
21 *believe that Mr. Aaron is correct, that the idea didn't*
22 *originate with Mr. DeLeon and Mr. Kabir. It originated with*
23 *the informant. Therefore, we're not going to consider that*
24 *piece of evidence as evidence showing the existence of an*
25 *illegal agreement and a conspiracy to materially assist or to*

10:25

10:26

1 *engage in terrorist acts in Afghanistan.*

2 That's essential to the defense case. That's
3 defending the case. That's the only way we can defend it.

4 THE COURT: Well, the Government's case is -- well,
5 among many things in the Government's case is that -- just to 10:26
6 go with this example -- and there, I think, are many others --
7 is that Kabir was -- Mr. Kabir was counseling the other
8 defendants while he was in -- most of while he was in
9 Afghanistan but perhaps while he was in Germany as well, on how
10 to prepare. 10:26

11 And so if I understand your argument correctly, if
12 the confidential source is testifying that the -- he went with
13 the defendants, the U.S.-based defendants, to a paint ball
14 range or a shooting range because they had said *the defendant*
15 *Kabir told us we needed to do this to prepare*, you want to 10:27
16 cross-examine that. And that really has nothing to do with
17 entrapment. Well, it may have something to do with entrapment,
18 but it doesn't have to do with entrapment of Kabir. It has to
19 do with whether or not the confidential source is being
20 truthful about whose idea it was, for example. 10:27

21 MR. AARON: Correct. There are a lot of things which
22 look like they could serve the purposes of both an entrapment
23 defense and the discrediting of the informant and the proof
24 that the acts and statements supposed to be attributed to
25 Mr. Kabir or affirmed by Mr. Kabir should not be, that that's 10:27

1 correct.

2 THE COURT: Because I -- all right. I think I
3 understand your position.

4 On that point, did you want to add anything,
5 Ms. DeWitt?

10:28

6 MS. DEWITT: I think Mr. Grigg does. He's so much
7 more eloquent than me.

8 Your Honor, the bottom line here is we're not arguing
9 that the defendant cannot challenge the sufficiency of the
10 evidence. We are not arguing that he can't put on a defense.
11 What we're saying is that he can't put on an entrapment
12 defense, and he cannot put on evidence that in this case would
13 clearly go only to --

10:28

14 THE COURT: Only to.

15 MS. DEWITT: -- a derivative entrapment defense.

10:28

16 THE COURT: But there's a lot of evidence -- and I
17 think the example that we just explored is one where it could
18 be interpreted as going to more than one type of defense.

19 MS. DEWITT: There certainly are instances, Your
20 Honor, where you're going to have to make those calls at trial,
21 where it could go to the sufficiency of the evidence. But
22 there is also -- I would submit there is going to be instances
23 where this is clearly an effort by the defense to backdoor an
24 entrapment defense and to backdoor evidence that is not
25 relevant, that is confusing to the jury, and then is aimed,

10:28

10:29

1 essentially, at jury nullification or to inflame the jurors.

2 So all I'm saying is there does not appear to be --
3 other than strictly challenging the evidence and the
4 sufficiency of the evidence -- much ground here; although,
5 there may be some where there's an overlap, in introducing 10:29
6 evidence by Mr. Kabir that really isn't, truthfully, an effort
7 to get in derivative entrapment defense.

8 THE COURT: But there is -- the Government's case --
9 well, you both know your cases, and I don't -- I'm never
10 comfortable saying, *I think this is what your case is*, but my 10:29
11 understanding is that the Government is taking the position
12 that Mr. Kabir was the leader of this conspiracy. And so to
13 the extent that the Government is trying to prove that at
14 trial, and the confidential source -- and my understanding is
15 the Government hasn't even made a decision if he's going to 10:30
16 testify. Have you yet?

17 MS. DEWITT: No, Your Honor.

18 THE COURT: So if he testifies, he's going to be
19 subject to cross-examination as to that principle, that
20 Mr. Kabir was the leader and was guiding the co-defendants. 10:30
21 And I don't think that goes only to entrapment.

22 MS. DEWITT: It may not in certain instances, Your
23 Honor, but it also -- whether or not the defendant is guilty of
24 a conspiracy has -- the evidence relating to what the CHS did
25 separate and apart from him is not relevant to the issues of 10:30

1 guilt.

2 THE COURT: I think I understand both sides'
3 positions.

4 Did you wish to be heard further on this point --
5 well, not this point, but this motion? 10:31

6 MR. AARON: Yes, Your Honor.

7 Your Honor, I object to the Government's argument
8 that this is an attempt by the defense to backdoor an
9 impermissible defense. I object to the delig --

10 THE COURT: Delegitimization. 10:31

11 MR. AARON: Thank you. Of the defense --

12 THE COURT: Don't ask me to do that again. I'm not
13 sure I could pronounce that word again.

14 MR. AARON: Once was enough.

15 I object to that in this motion, and we've seen it 10:31
16 throughout this entire case.

17 We're entitled to defend him. It's our
18 responsibility to defend him. There is nothing that is
19 improper in us saying, *We want to challenge this evidence and*
20 *refute it*, and to show that the informant, or any other 10:31
21 Government witness, is a liar.

22 Your Honor, I would also point out that on Point 2 of
23 my opposition to the Government's motion in limine I had a
24 section entitled, *Mr. Hammad's entrapment of Mr. DeLeon makes*
25 *the alleged co-conspirator statements of Mr. DeLeon admissible* 10:31

1 *against Mr. Kabir.*

2 I don't believe that the Court issued a tentative on
3 that. And basically, the problem that we have is if Mr. DeLeon
4 is entrapped, then he's not a conspirator, so he can't conspire
5 with Mr. Kabir.

10:32

6 I'm aware of *Peralta* and the cases that say if you
7 have conspirators on trial and one is acquitted, you don't go
8 backwards and say, *Because Joe was acquitted, Bill, that he*
9 *conspired with, Bill can't have the statements that Joe made*
10 *introduced against him.*

10:32

11 Because that would basically mean anytime you had a
12 conspiracy trial and any defendant was acquitted, that you'd
13 have to go back and unravel the entire thing and see that each
14 conviction did not rest on that acquitted individual's
15 statements.

10:32

16 The difference between an acquittal and entrapment is
17 of moment here.

18 If you have an acquittal, you don't know why that
19 person was acquitted. There could have been strong evidence,
20 there could have been clear and convincing evidence of guilt,
21 and the jury could have decided it's just not sufficient.
22 There could have been any number of reasons.

10:33

23 THE COURT: But if you -- and I thought I had cited
24 this case in my tentative, but it looks like I didn't. But if
25 you look at *United States v. Gurrola*, which is 333 F.3d 944,

10:33

1 that's a case that was tried in front of Judge Baird. And one
2 of the defendants was convicted; one, the Court denied a -- let
3 me see if I have the facts right -- denied a -- Labrada was, I
4 believe, convicted. Ortega was denied and -- maybe both of
5 them were denied an entrapment defense. But the Ninth Circuit 10:34
6 reversed as to Ortega and sent it back for retrial, saying
7 that, you know, the evidence -- well, in that case, saying
8 there was no evidence of predisposition. But in any event,
9 that there should have been an entrapment defense.

10 And I think that the outcome in that case shows that 10:34
11 even if you have one defendant who was potentially entrapped
12 and another who was not, your argument that that means that the
13 statements of one are not admissible against the other would
14 fail.

15 MR. AARON: Your Honor, I'm sorry. What's the case? 10:34

16 THE COURT: *Gurrola*, G-u-r-r-o-l-a.

17 But I'll look at -- I will address that further.

18 MR. AARON: And the reason I wanted to bring that to
19 the Court's attention is because the difference between an
20 acquittal and entrapment is different. 10:35

21 Entrapment is kind of like a -- it's like a
22 suppression issue. The whole point of it is to punish the
23 Government for its improper actions. It's not simply a
24 sentencing mitigator. It's a complete defense, and it's
25 designed to punish the Government. 10:35

1 Unlike an acquittal, which is just -- if someone is
2 acquitted, that vindicates the Government's role in bringing
3 the case. The Government's role, whether or not someone is
4 acquitted, is that justice be done. And we can't speculate as
5 to the reasons of an acquittal, and it is not as punitive as
6 entrapment is.

10:35

7 That's all the argument I have on that motion, Your
8 Honor. Thank you.

9 THE COURT: Do you wish to address the *Peralta* or
10 *Gurrola* issue?

10:35

11 MS. DEWITT: Yes.

12 As we already have set forth in our reply brief, his
13 argument here, essentially, it basically turns the law on its
14 head because the whole presumption behind an entrapment defense
15 is that the person is admitting that they were a
16 co-conspirator. And by doing so, essentially they are
17 admitting that statements made during the course of that
18 conspiracy are co-conspirator statements.

10:36

19 And putting his equitable argument aside, there is
20 simply no case law that suggests that that's an appropriate
21 remedy in terms of how one treats those statements that are
22 made during the course of that conspiracy.

10:36

23 In fact, you could never do that because you'd have
24 to wait until the end of the trial to decide whether or not a
25 jury came to a conclusion about one -- the guilt of someone.

10:36

1 And even in those cases where a jury comes to the
2 conclusion that there is not an entrapment defense, there is
3 not even enough evidence of guilt, the courts have found that
4 the co-conspirator statements still come in.

5 So I'm not familiar with the case that you're citing,
6 but it sounds like it further supports the conclusion that
7 these are co-conspirator statements. And those issues as to
8 whether there is or isn't an entrapment defense, whether
9 they're even charged in the conspiracy or not, whether there is
10 sufficient evidence of guilt, they're simply not relevant to
11 that analysis, to the analysis of whether -- to the
12 admissibility of those statements.

13 MR. AARON: Your Honor, I believe that the Government
14 chose a fundamental misunderstanding of the law.

15 You can deny committing an offense and have an
16 entrapment defense at the same time.

17 For example, in this case you could say, *Hey, there*
18 *was no agreement to conduct a conspiracy, but if you find such*
19 *an agreement, we were entrapped into doing it by the informant.*
20 It's not mutually exclusive. I -- yes, that is true. You can
21 run an entrapment defense while you are admitting the guilt for
22 the substantive offense; that part is correct.

23 THE COURT: All right. Let's move to the last
24 motion.

25 On Friday afternoon, the defense --

1 MR. THOMAS: Your Honor, did you want me to argue?

2 THE COURT: Oh, I'm sorry.

3 MR. THOMAS: And this is just to agree.

4 THE COURT: All right. So are you just saying,

5 *Ditto?*

10:38

6 MR. THOMAS: No, Your Honor, because the analysis is
7 different. It's much more pointed with respect to Mr. DeLeon.
8 And the Court hit the nail on the head with respect to both
9 points I'm going to make.

10 Number one, it's too early to rule on this because
11 the evidence hasn't come in. The Government gave its proffer
12 of what its evidence is. I gave a proffer as to what we
13 believe the defense evidence is. If the jury believes them,
14 they win. If the jury believes me, we win. That's why we have
15 trials, because jurors have to make determinations of fact.

10:38

10:38

16 An entrapment defense is an affirmative defense. It
17 adds -- once we raise some evidence, it adds elements that the
18 Government can prove predisposition and lack of inducement
19 beyond a reasonable doubt.

20 THE COURT: Right.

10:38

21 MR. THOMAS: Those are factual issues.

22 THE COURT: There are many -- I'm sorry for
23 interrupting you.

24 There are many cases that say that what the district
25 court should do once some evidence is introduced at trial, is

10:38

1 give an instruction -- excuse me, a special verdict for the
2 jury to decide both of those questions.

3 MR. THOMAS: That's right. And that's exactly what
4 we're going to propose.

5 Now, with respect to my second issue, the Court also 10:39
6 hit the nail on the head, and it is not the number of contacts
7 between my client and the CHS or what was said. It's the
8 timing of it. And the Government raises a whole long laundry
9 list of things that it thinks my client made admissions to or
10 acts that he did, but it is completely devoid of any argument 10:39
11 as to timing.

12 Mr. DeLeon met the CHS in February of 2012, and
13 99 percent of the things the Government cites happened after
14 that. So for the Government to somehow argue that my client's
15 plan for terrorism was well in the works before he met the CHS, 10:39
16 they certainly haven't proffered any evidence of that.

17 As a matter of fact, the only thing that the
18 Government knew about my client, before he met the CHS, was
19 that he converted to Islam and he met Kabir. Those are the
20 only two things they knew about him. Everything else came from 10:40
21 the CHS.

22 So it's obvious --

23 THE COURT: I think that the Government is about to
24 stand up and disagree with that, and I think that I set forth
25 in the tentative a number of things that the Government has 10:40

1 proffered evidence that they'll show at trial that took place
2 before your client met the CHS.

3 MR. THOMAS: I highly doubt it, Your Honor. They
4 might suggest it, but the timing is not going to bear itself
5 out with the evidence. As a matter of fact, when the
6 Government sent their CHS to meet my client at the mosque, I
7 don't know if you saw the first report that the CHS gave the
8 Government about Mr. DeLeon some six or seven weeks after they
9 met my client.

10 *The CHS does not believe DeLeon possesses a threat of*
11 *violence to the U.S. or overseas.*

12 That sounds like lack of predisposition.

13 *While he's very religious, he's fairly new to the*
14 *religion. His strict appearance is not uncommon. He appears*
15 *to be rational, somewhat caring. He's very career-minded and*
16 *focused on school and acquiring his degree, and then joining*
17 *the professional ranks in Saudi Arabia.*

18 The CHS's assessment was that DeLeon may be
19 sympathetic and supportive of those wishing to carry out Jihad,
20 but he does not currently aspire to be a Jihadist himself.

21 That is point-blank evidence of lack of
22 predisposition, and that came from the Government's agent to
23 his handler shortly after meeting Mr. DeLeon after February of
24 2012. Everything else the Government cited happened after
25 that, and it's our argument that it happened at the behest of

1 the CHS: The paint-balling, the going to the gun range, these
2 statements about Anwar al-Awlaki and the radical nature of his
3 lectures, the things about how this is offensive Jihad and not
4 a defensive Jihad, and, no, you have to drop out of school.
5 You don't need to have your degree to go to heaven or to
6 paradise.

10:42

7 All these things were at the behest of the CHS, and
8 he took -- he preyed upon the naiveté of Mr. DeLeon and his
9 desire to work off some charges for his drug dealing, and tried
10 to turn him into a terrorist for ten months, from February
11 until November -- nine months.

10:42

12 And so all of these acts that the Government pointed
13 to, and all these statements and things that were being
14 recorded by the CHS, that's all after Mr. DeLeon met the CHS.

15 So, you know, it almost defies credulity for the
16 Government to say that this was well in the works, when they
17 didn't know anything about him before they put the snitch in
18 place. All they knew was that Santana had some problems at
19 LAX; they sent the snitch in to focus on Santana, and then the
20 snitch comes back and says, *Oh, there's this fresh meat,*
21 *DeLeon, in the mosque. Maybe I can convert him,* and the
22 Government says, *Yeah, go ahead,* and they do.

10:42

10:43

23 That's our defense. If the jury believes that, that
24 is point-blank entrapment.

25 So I can't really put it all in in a context before

10:43

1 the trial to get you to understand that that's what the jury
2 will find. But if the jury does find that, I'm sure Your Honor
3 will agree that we have met some evidence for the entrapment.

4 THE COURT: Right. But I am concerned -- all right.
5 I understand your position.

10:43

6 Do you wish to respond?

7 MS. DEWITT: Very briefly, Your Honor.

8 Again, my point in raising this here was simply to,
9 again, emphasize the fact that there is evidence that the
10 Government has submitted, contrary to the claims here. There
11 is evidence, and it's sworn and it's supported, and it shows
12 the timeline. It shows statements by his client in his own
13 words. It shows that, clearly, the CHS, who was trying to be
14 honest and make an initial assessment of DeLeon, which, when he
15 learned more, learned that he was wrong, and that the evidence
16 clearly shows, by his client's own sworn and recorded words,
17 that he invited the CHS into a preexisting conspiracy.

10:43

10:44

18 But my concern that I'm raising here, Your Honor, is
19 that Mr. Thomas is making all these allegations about what he's
20 going to introduce at trial and what he's -- you know, he's put
21 his best foot forward here, in terms of opposing this motion in
22 limine. All of these statements directly contradict what he
23 concedes is his client's honest statements at a proffer -- at a
24 proffer session. His client directly contradicts all of the
25 things that he's saying in this unsupported opposition.

10:44

10:44

1 And, you know, again, defense attorneys get to make
2 arguments on behalf of their clients. They get to use
3 evidence, and they get to make arguments about that evidence,
4 but they don't get a blank slate. They don't get to say, *Black*
5 *is white* when they know that black is not white.

10:45

6 And that's the point that I'm making here, is that
7 given that you have no actual evidence in support of the
8 opposition here, and given that we have now a proffer statement
9 that's put at issue that says exactly the opposite, you know,
10 the Government is in an impossible situation.

10:45

11 There is no reason to allow an entrapment defense
12 based upon what's currently before the Court.

13 THE COURT: In terms of what was said in the
14 proffer --

15 MS. DEWITT: Exactly.

10:45

16 THE COURT: -- session. All right.

17 Well, before we move on to the last motion, I guess
18 it would be -- probably be best for the Government to contact
19 Mr. Driggs to see if he's available on Thursday.

20 MR. THOMAS: I meant to.

10:45

21 THE COURT: Are you available on Thursday?

22 MR. THOMAS: I have two depositions on Thursday, a
23 morning and afternoon. I'm wide open Friday.

24 THE COURT: I have a motion to suppress hearing on
25 Friday that counsel thinks will take all day.

10:45

1 MR. THOMAS: Well, Your Honor, another issue is we
2 really wanted to wait for the transcript. And we do, I think,
3 already have a hearing on the 23rd for the Daubert hearing.

4 THE COURT: I really don't want to put this off that
5 long. Let's go off the record for a moment. 10:46

6 (Discussion was held off the record.)

7 THE COURT: All right. How about next Monday
8 afternoon?

9 MR. THOMAS: That's open, Your Honor.

10 THE COURT: At 2:30? 2:00 even? 10:47

11 MS. DEWITT: That's fine with us, Your Honor.

12 MR. AARON: I have duty that day at 3:00, but if it's
13 at 2:00 I don't anticipate that it would be that long of a
14 hearing.

15 THE COURT: No. Maybe you can get somebody else in 10:48
16 your office to cover your duty if it does.

17 And will you contact Mr. Driggs?

18 MS. DEWITT: We will call him as soon as we get out
19 of court, Your Honor, to confirm his availability. 2:00 on
20 Monday. 10:48

21 THE COURT: Monday, a week from today.

22 MS. DEWITT: Maybe we will be able to submit a
23 declaration ahead of time, if we get one from the Court, and
24 that may expedite the hearing, as well.

25 THE COURT: All right. Thank you. 10:48

1 So the last motion, and as I started to say, the
2 defense filed a supplemental -- I suppose the word *disclosure*
3 was meant to be in there -- regarding the testimony of
4 Victoroff and Sageman.

5 At this point, I'm inclined to grant the motion to 10:48
6 exclude the testimony of Dr. Victoroff. The proposed testimony
7 of that witness goes to the defendant -- defendant Kabir's
8 seizure -- broadly speaking, the seizure disorder. The
9 supplemental disclosure adds pretty much nothing other than to
10 say that, you know, there's been an examination late in May, 10:49
11 that the witness would like to do further testing.

12 But the original opposition to the motion, and I'm
13 very disturbed of the lateness of the supplemental disclosure;
14 although, on the other hand, it says so little. But, you know,
15 the gist of the opposition -- and this is not the first time 10:49
16 this issue has come before the Court -- is that the Government
17 turned over its discovery in this case so late that the defense
18 has not been able to comply with the Court's orders and
19 designate its experts. And then, to a certain extent, the lack
20 of a budget last year, until October, prevented the defense 10:50
21 from getting funding or making a decision.

22 You know, the argument about the discovery just has
23 no bearing on Dr. Victoroff. The defense did not need the
24 Government's discovery in order for Dr. Victoroff to do an
25 assessment of Mr. Kabir's neurological issues. So that's just 10:50

1 utterly non-persuasive.

2 And, you know, the timeline in this case is that
3 Kabir's first appearance in this Court was December 14th, 2012.
4 He was arraigned on the First Superseding Indictment
5 December 19th, 2012; trial was set for February 5th, 2012. 10:50
6 After many continuances and hearings, it was moved to July 1st,
7 and now it is set for August the 12th.

8 The first date, I think -- the very first date that
9 was set for defendants to disclose and file expert witness
10 designations was -- and I don't think this was the first date, 10:51
11 but was September the 30th, 2013, and there was no compliance.
12 And then that deadline was continued to February 2014, and the
13 notice of experts that was filed on 2/14/14 gave no information
14 about the nature of their anticipated testimony.

15 I ordered defendant Kabir to supplement that 10:51
16 disclosure on April 25th, and it wasn't done by that date.

17 A supplemental expert notice was filed on May 2nd,
18 but no further information was given.

19 Again, there were just complaints about the volume of
20 discovery. But as to Victoroff, that does nothing to explain 10:51
21 why he needed the discovery to opine about the seizure
22 disorder.

23 So I am inclined to grant the motion as to Victoroff.

24 The supplemental disclosure that was filed last
25 Friday, which really gives the Government no opportunity to 10:52

1 respond, as well as, you know, assuming that the Court -- well,
2 it's just untimely. Although, obviously, I reviewed it.

3 As to Sageman, says nothing other than Sageman will
4 respond to what the Government's expert will opine, and we
5 haven't seen his report yet. So I will listen to argument as 10:52
6 to Sageman, but the trial date is not going to be moved again.
7 For a number of reasons, it cannot be moved again. And I don't
8 see anything else in terms of a plausible remedy here but to
9 exclude Dr. Victoroff's testimony.

10 Mr. Aaron? 10:53

11 MR. AARON: Your Honor, the point of having these
12 trials is to determine justice, is to be fair to all parties.
13 It's not to accommodate the Government's calendar or the
14 defense calendar. That's why we're here. We're here to do
15 justice. We're not here to make a calendar. 10:53

16 THE COURT: Mr. Aaron, I don't need a lecture about
17 my -- the purpose of trials. But one of the things in
18 obtaining justice for both sides is to do things in a timely
19 manner, that, when those rules are enforced as to both sides
20 consistently, is a means of getting to justice. 10:53

21 MR. AARON: Absolutely, Your Honor. And we wish very
22 much not for special treatment but for treatment that any other
23 litigant would get. And if I can explain briefly what's going
24 on here.

25 Your Honor, we are not in the same position as the 10:54

1 Government. We do not have the same resources. We do not have
2 the same funding. We do not have the same staffing. We do not
3 have the same indulgence from law enforcement agencies or other
4 administrative agencies. We do not have any of that.

5 I have one lawyer with me. I have one lawyer who
6 does sometimes help with the filing of motions, particularly
7 the ones that might come up on appeal. I have one investigator
8 on this case.

9 In the meantime, while all of this was going on, the
10 entire time that we've had this case, Your Honor, I've been
11 managing an office. I've had two other trials, almost three.
12 I've had a full caseload. We've had budget problems. We did
13 not even have approval to hire these experts until January.

14 We do need -- despite what the Court may think, and I
15 don't know what experience the Court has had in working on the
16 defense side of the table or the Government has had working on
17 the defense side of the table, but I can tell you, and I can
18 get affidavits from other defense attorneys, because it's just
19 part of the standard practice that you look to see the evidence
20 the Government has, and you try and capture that evidence.

21 There has been a lot of evidence which we have
22 received from the Government that we have turned over to
23 Dr. Victoroff, which I believe he would say is essential. And
24 the amount of discovery that we've had to deal with is vitally
25 important in this case because, Your Honor, we do not have the

1 resources to contact Dr. Victoroff, to go with him to MDC, to
2 send the material, when we are dealing with other things.

3 Just -- let's just consider what happened when the
4 Government filed its motion on May 12th. Let's just consider
5 what happened since then. 10:55

6 On May 22nd, it told us -- it told us that it would
7 be using a new and different expert instead of one of its
8 previous experts. So we had to deal with a new expert witness
9 disclosure by the Government after it had filed this motion to
10 exclude our expert witness disclosure. 10:56

11 On that same day, they provided the new expert
12 witness's C.V. and the prior testimony. That was a total of
13 57 pages. On that date, and only on that date, despite all the
14 other orders from the Court, they finally said, *Yes, the*
15 *amounts so far that Dr. -- Mr. Coleman has been paid is over a* 10:56
16 *million dollars since 2003.* We only discovered that then.

17 On that date, they told us that they would provide
18 another witness disclosure from Mr. Coleman. They didn't know
19 when. They thought it might be later in June, but they didn't
20 know when, and they didn't tell us what it would contain. 10:56

21 So when you're considering what happens with
22 Dr. Sageman and Dr. Victoroff, you need to remember, please,
23 these discovery problems.

24 But it doesn't end then.

25 On the 29th, just seven days later, the Government 10:56

1 provided a BluRay disk with more media discovery, discovery
2 that had been available to them since Mr. Santana's arrest in
3 November 2012. It's vitally important to remember the dates
4 that they had this discovery because they've had it for over a
5 year. They have been able to examine it for over a year. They
6 give it to us when we're scrambling to get our experts prepared
7 for trial that starts in 58 days. How unfair is that? No
8 civil litigant would ever have to do that.

10:57

9 On the 29th, they provided digital discovery and a
10 forensic examination by the Government expert into Mr. DeLeon's
11 phone that, again, they had since November of 2012.

10:57

12 On the 29th of May, again they provided more
13 discovery related to the confidential informant. This time,
14 Your Honor, this discovery they even had before that. This
15 discovery they had from May -- I'm sorry, from June 2011 to
16 January 2012. Even before then, they had that discovery, and
17 they didn't provide us more than 17 months later.

10:57

18 Then the next day, on the 30th, we receive almost 600
19 pages of discovery, records of the defendants that have been in
20 the Government's possession for some time, interviews of new
21 witnesses, and a CD of the jail calls of one of the defendants
22 from March 2013. And, Your Honor, I have a copy of that
23 discovery letter, if the Court wants to see it.

10:57

24 Despite this massive onslaught of new discovery, I
25 made every effort to provide the Government new expert witness

10:58

1 information. I talked with Dr. Sageman myself, and I told him,
2 *Even though you only have the preliminary notice*, because he
3 told me, *I need the final --*

4 THE COURT: You need to speak more slowly.

5 MR. AARON: *I need the final witness disclosure. I* 10:58
6 *need to know what this guy is actually going to say before I*
7 *can rebut it.*

8 Well, that's just common sense.

9 I said, *Doctor, even though you only have the*
10 *preliminary notice, what could you say, knowing that they may* 10:58
11 *come up with additional information later on? What could you*
12 *just say based on this?*

13 He told me, and I communicated that to the
14 Government.

15 Despite all this discovery that both Ms. Viramontes 10:58
16 and I have been wrestling with, she tried to contact
17 Dr. Victoroff several times. I tried contacting him. I didn't
18 know that he had actually seen Mr. Kabir on May 29th. We
19 didn't know that because, unlike the Government witnesses, our
20 witnesses are not our employees, they're only our consultants. 10:59
21 They have other jobs, other teaching and other writing
22 commitments. So he didn't contact us, for whatever reason,
23 until the 4th, and I personally spoke with him.

24 Once -- I'm sorry, it was the 5th.

25 Once I spoke with him, I prepared the expert witness 10:59

1 notice, and I provided that notice. And I have a copy of that
2 notice, as well, if the Court needs it. Although from the
3 Court's comments, I believe that the Court has already read it.

4 So in order for our experts to render their opinions,
5 in order for us to provide those opinions to the Government, we
6 need to have the discovery from the Government. Just to say,
7 *You know what, Dr. Victoroff, go in there and do an*
8 *examination, it's meaningless, Your Honor.*

9 We have to say, *We think this is what the Government*
10 *will show. We want you to go into an examination and see if*
11 *there is anything to support a defense to that.*

12 In order to --

13 THE COURT: But the vast majority of the discovery in
14 this case, how could it relate to whether or not your client
15 has a seizure disorder? And how does that relate to, for
16 example, his mens rea?

17 MR. AARON: That's absolutely right, Your Honor. The
18 vast majority of the discovery in this case does not relate to
19 that. That's absolutely true. But we don't know that until we
20 get it, and we don't know it until we've read it. And
21 sometimes, Your Honor, it only takes one, two, three, four or
22 five pages. And I will get to that in just a minute.

23 I have provided specific discovery to the request for
24 some time since January 17th of this year. I've sent no less
25 than 16 requests for discovery productions to the Government,

1 many of them containing numbered requests for various items.
2 Some, the Government has complied with. Some requests the
3 Government has simply ignored.

4 I wrote a 23-page letter detailing our requests, the
5 outstanding requests, and setting forth a timeline from June --
6 from January 17th, 2014 up to the present.

7 And I have a copy of this letter, if the Court wants
8 to review that as well. I've even got a copy of the
9 Government's response because I'm not trying to hide anything.
10 I just want fair and equal treatment.

11 We're having continuing problems getting discovery.
12 And one of the things, Your Honor --

13 THE COURT: Well, you're telling me you have too
14 much, and you're telling me you don't have enough.

15 MR. AARON: Yes. Yes.

16 THE COURT: But you're not telling -- and you're
17 telling me that you have to review every single piece of paper
18 -- well, that's figuratively speaking since most of it is
19 electronic. And until you've done that, you can't give --
20 Dr. Victoroff cannot be prepared to examine.

21 That defies belief. There are large quantities of
22 discovery in this case that I think you could easily perceive
23 at the outset are not going to relate to what Dr. Victoroff
24 would need before he examines your client.

25 MR. AARON: You would think so, Your Honor.

1 THE COURT: I do think so.

2 MR. AARON: Much to my surprise -- and again, I have
3 the discovery letter if the Court wants to see it.

4 THE COURT: I'm not going to review it now. I've
5 reviewed plenty in connection with today's hearing, and you 11:02
6 could have submitted this in connection with your opposition,
7 but you did not.

8 MR. AARON: I did not, Your Honor, because I was
9 simply too busy trying to keep up with the massive onslaught of
10 discovery. And one of the interesting things -- 11:02

11 THE COURT: Well, this is not my only case, either.

12 MR. AARON. I understand that.

13 THE COURT: And I have been in -- I don't know --
14 trial a few times this year as well.

15 MR. AARON: I understand that, Your Honor. 11:02

16 THE COURT: I understand that the role of a trial
17 judge is different than the role of the trial attorney, but I'm
18 just not inclined -- well, I'm just not necessarily persuaded
19 by the fact that you've had two trials this year. I've
20 probably had ten. I'm sure Government counsel have other 11:02
21 things to do as well. And the Government bears the burden of
22 proof.

23 MR. AARON: Your Honor, it's not just the two trials,
24 it's all of the other factors I mentioned as well. And I
25 understand that the Court is overworked. I know that the Court 11:03

1 is --

2 THE COURT: We're all overworked.

3 MR. AARON: Right.

4 THE COURT: That's part of our jobs.

5 MR. AARON: Right. And if I was defending the Court, 11:03
6 I would certainly have many things to say on that point. But
7 I'm defending Mr. Kabir, and I have to --

8 THE COURT: I understand that, and I understand --
9 well, the responsibilities that you bear, you know, is
10 incredibly brave, and I appreciate that. And I appreciate that 11:03
11 the arguments you're making arise out of that profound
12 responsibility.

13 MR. AARON: Your Honor, can I point out two specific
14 instances?

15 THE COURT: Yes. 11:03

16 MR. AARON: Two specific instances: We have asked
17 for the plea agreements for the cooperating witnesses. We have
18 asked for that, I believe, in our original discovery demand
19 letter in December of 2012. The Government has had -- the
20 Government negotiated those plea agreements. They know exactly 11:04
21 what's in them. They've had them, and they've kept them from
22 us for weeks. I've ask them again and again and again. And
23 each time, I've had to set aside attorney time for either
24 myself or Ms. Viramontes to ask them, to write them e-mails, to
25 call them up, whatever. We've asked for weeks. Only this last 11:04

1 Friday did they agree to provide them.

2 THE COURT: But Mr. Aaron, that does not go to what
3 -- again, what Mr. -- what Dr. Victoroff needs to examine your
4 client. Those plea agreements -- tell me how those go to what
5 Dr. Victoroff needs to conduct the examination of your client
6 and prepare a report. 11:04

7 MR. AARON: That's correct, Your Honor. That goes to
8 the delay in our being able to get this information to other
9 information to him and communicate with him. The Court's
10 absolutely right. Those plea agreements are not relevant, so 11:04
11 far as I know. I haven't yet seen them, but they're not
12 relevant to Dr. Victoroff's examination.

13 What would be relevant might be his Army medical
14 records where they talk about his epilepsy. We didn't get
15 those until May 30th from the Government. 11:05

16 Your Honor, many times, many times we've requested
17 discovery again and again, and we've not gotten it. So what
18 the Government does here is, they've given us discovery late,
19 they've ignored discovery requests. I've even written to them
20 saying, what -- Allen Chiu, for example, will write and say, 11:05
21 *Here's a discovery production.*

22 I'll say, *Well, what request does that respond to?*

23 Mr. Chiu, no response. Completely ignored.

24 Even the *Brady* material that the Court had said back
25 in May that we should have, I said, *When are we going to get* 11:05

1 *all of it?*

2 And they said, *We don't know. We're still looking.*
3 *You've gotten the vast majority of it, but we'll get it to you.*

4 And as I pointed out -- and you can see, if the Court
5 wants to review the discovery letter from May 30th, you'll see 11:05
6 that there's information there that they had from 2012 and
7 2011, that they've had all this time.

8 The advantage that the Government has is that they
9 can look at information and evidence from 2012 and 2013 or
10 early in 2014. They can look at it. They can understand it. 11:06
11 They can give it to their experts. And they can wait to
12 provide it to the defense until 58 days before trial. And
13 that's exactly what they've done here.

14 And then when they do that, they say, you know what?
15 Because you didn't adequately process the information that 11:06
16 we've only given you 58 days before trial, or a month before
17 that, or two weeks before that, we're going to exclude your
18 expert.

19 And that's exactly what they're doing here.

20 THE COURT: All right. Let me let the Government 11:06
21 respond.

22 MR. GRIGG: Thank you, Your Honor.

23 I'd like to sort of bring us back to the motions
24 before the Court on the experts.

25 Discovery has been voluminous since the beginning. 11:07

1 And as the Court may or may not be aware, even before the
2 detention hearing for this defendant, the magistrate judge
3 ordered the Government to have available discovery
4 pre-indictment, pre-detention hearing discovery. The
5 Government had that available at the hearing.

11:07

6 The defense has had more than substantial information
7 for a neurologist to make an assessment of the client and make
8 a report and make the finding. And then for the defense to
9 explain to the Court -- so it can exercise its gatekeeping
10 function -- how the expert, the witness, arrived at his or her
11 opinions and how those opinions matter for the case.

11:07

12 And nothing that's been said today, as the Court has
13 noted, bears on Dr. Victoroff's ability or function in
14 preparing neurological assessment of Mr. Kabir.

15 Mr. Victoroff writes that -- excuse me.

11:08

16 Defendant writes that Mr. Victoroff assesses that,
17 *After an unspecified head trauma, Mr. Kabir developed epilepsy.*

18 And we have no basis to understand when or how that
19 arose, or how that assessment was made.

20 *He appears to be someone who is hyperreligious, and*
21 *his interest in jihad seems to have increased. He's a*
22 *psychotic. He believes the West is responsible for all the*
23 *world's ills, and believes these things with absolute*
24 *certainty.*

11:08

25 Nothing about the contents of Ralph DeLeon's

11:08

1 cellphone, or the plea agreements for other defendants who are
2 not before the Court today, has any bearing on that
3 information. Nor is there any basis to assess or understand
4 how Dr. Victoroff arrived at these decisions. He talks about
5 tests but doesn't say what those tests were, what methods he
6 used to apply those tests, and he doesn't say what bearing that
7 has on any fact at issue in the case.

11:08

8 And all of the arguments about discovery don't matter
9 for Dr. Victoroff.

10 What seems to be the argument is that Dr. Sageman
11 can't do his function and therefore allow the Court to exercise
12 its gatekeeping role with respect to him because there is more
13 information that keeps coming forth.

11:09

14 The problem is, initially when Mr. Kabir made his
15 first filing that he styled as an expert notice, he indicated
16 that Dr. Sageman would testify -- I'm quoting from page 5 of 9
17 of Document No. 208 that's Mr. Kabir's filing on February 14th,
18 line 23: *It's anticipated that Dr. Sageman will testify as to*
19 *the political, sociocultural and security aspects of terrorism*
20 *and terror networks in Afghanistan. It is also anticipated*
21 *that he will testify as to the psychology of terrorists and*
22 *terror networks.*

11:09

11:09

23 On Friday, the filing by defendant Kabir said merely,
24 in essence, that Dr. Sageman was going to be an expert on Evan
25 Coleman.

11:10

1 THE COURT: That he's going to rebut the Coleman
2 testimony.

3 MR. GRIGG: Without an explanation of how, without an
4 explanation of what the purported scientific analysis that
5 allows him to make a, quote, *review and assessment* of 11:10
6 Mr. Coleman, how that functions, whether that's a valid,
7 applicable scientific test. We have no basis to understand how
8 Dr. Sageman is making these assessments that obviously he's
9 already provided to defendant Kabir.

10 So the Government, with respect to Dr. Sageman, is 11:10
11 asking that the Court order defendant Kabir to make full Rule
12 16 disclosures.

13 Rule 16 doesn't just require the identification by
14 C.V. and generic statements that he's only a rebuttal witness,
15 it requires an explanation of the bases and the reasons on 11:11
16 which the expert arrives at his or her opinion. And merely
17 calling Dr. Sageman on rebuttal is kind of hiding what it is
18 he's doing and how he's doing it, which is exactly the aspect
19 of his work the Court needs to assess to determine whether it's
20 admissible. 11:11

21 As the Court may or may not be aware, this is a
22 witness who, as listed in some of the C.V. materials for
23 Dr. Sageman, has written various things about various aspects
24 of being an expert witness, about theories with respect to
25 individuals that were the subject of an assessment ten years 11:11

1 ago. But there's no explanation of how any of those pieces of
2 information bear on this case. And that's the problem. We
3 don't know how this bears on this case.

4 And to a certain extent, if we want to call
5 Dr. Sageman a rebuttal witness, then he should be ordered 11:11
6 excluded unless and until Evan Coleman testifies. And then he
7 should only be permitted to testify as to the specific subjects
8 that Coleman testifies about. And he should not be allowed to
9 opine independently about evidence in this case, except to the
10 extent that it is involved in Coleman's testimony. 11:12

11 And the problem is, we have no information more than
12 we had earlier in this case. We've gotten none. And now we're
13 almost five months after Mr. Kabir represents that he's been
14 able to pay these experts. We have nothing, no basis to
15 understand how Sageman will arrive at his conclusions. 11:12

16 We expect he will sit here in trial and watch the
17 testimony and then say something when he's called, but we have
18 no basis to understand what scientific methods or what expert
19 methods he's using to make those assessments that he wants to
20 influence the jury with. The point of having his testimony is 11:12
21 to influence the jury to think about certain things.

22 Argument about that Dr. Sageman's view of the
23 relevance of some of the evidence in this case seems to be a
24 little bit improper and a little bit intruding on the function
25 of (A), the Court in determining what is relevant evidence, and 11:13

1 (B), the province of the jury in assessing what weight to
2 assign to evidence.

3 The problem is we just don't know. Neither the Court
4 nor the Government can say at this point what he will say, how
5 he got there, and what are the resources and materials on which 11:13
6 he relied to make his assessments.

7 For that reason, the Court should compel Rule 16
8 compliant disclosure.

9 And with respect to Dr. Victoroff, the Court should
10 exclude him as, (A), the defendant has not given a mental 11:13
11 health defense notice, within the meaning of Rule 12.2 and has
12 not provided any Rule 16 information with respect to
13 Dr. Sageman. And even if he had, even if this Friday filing
14 qualifies, the information contained in there about Mr. Kabir's
15 psychoses and his current presentations, when it's assessed in 11:13
16 May 2014, almost a year and a half after this case ended, how
17 that's relevant in any way to an issue of fact before the jury,
18 is unclear. There is no explanation in that. And we'd submit
19 it's not.

20 And the problem here is the Court has already ruled 11:14
21 that a certain aspect of Mr. Kabir's treatments -- treatment,
22 excuse me, after his capture is not a proper subject matter for
23 the jury.

24 A neurologist assessing him now, of course, is
25 necessarily going to say, *Well, I don't know how he was before* 11:14

1 I met him on May 29th -- or whatever the date was. Even
2 counsel wasn't aware when it was.

3 How does the present-sense impression that he gets
4 from a four-hour interview have anything to do with what
5 happened back in 2010 when Kabir first met DeLeon or Santana? 11:14
6 How does that have anything to do with Kabir's decision to
7 leave the United States in December of 2011? How does it have
8 anything to do with Kabir's decision to go to Afghanistan in
9 July 2012?

10 I mean, there is no issue of fact for which the 11:15
11 assessments that he believes the West is responsible for all
12 the world's ills and believes that with absolute certainty,
13 where he is increasingly interested in jihad now, there is no
14 correlation to the evidence in this case.

15 And with that, the Government would submit, Your 11:15
16 Honor.

17 MR. AARON: Your Honor, the sufficiency, or the lack
18 of sufficiency, of the proffer as to Mr. Sageman or
19 Dr. Victoroff, many of those things can be handled in
20 cross-examination. That's what cross-examination is for. 11:15

21 In terms of the mental defense, I have not had
22 sufficient time to talk to Dr. Victoroff about that. And the
23 Government is correct. We have not, at this point, put notice
24 of the mental defense.

25 In terms of the Government's argument that our 11:15

1 actions or anticipated use of Dr. Sageman is improper or that
2 we're hiding what he's doing, again, that's a delegitimization
3 -- I'm pleased I did manage to finally say that word -- it's a
4 delegitimization of the defense again, and it's an ad hominem
5 argument.

11:16

6 Your Honor, I would ask the Court, lastly, to
7 consider this: If the Court excludes two crucial defense
8 expert witnesses, what is the harm to the Government versus the
9 defense?

10 The harm to the Government is that they may have to
11 file a Daubert motion, if indeed they do file one a little bit
12 later.

11:16

13 The harm to the defense? Mr. Kabir may spend life in
14 prison.

15 THE COURT: I'm going to take -- well, I'm not going
16 to take under submission the DeLeon motion because I have to
17 have that hearing. So that's essentially continued until next
18 Monday.

11:16

19 I will take under submission the motion as to the
20 entrapment defense. I'm not inclined to change my mind, but I
21 just want to make a few changes in the order.

11:17

22 And I will take under submission the motion as to the
23 two experts. But as to the defense counsel's last argument,
24 the Government isn't seeking an order excluding Mr. Sageman.

25 But I am -- I am just not persuaded by the argument

11:17

1 that has been presented as to Dr. Victoroff. That motion is
2 under submission. I'll issue a written order.

3 Anything else we need to take up this morning?

4 MS. DEWITT: One quick issue, Your Honor.

5 It's come to our attention that Mr. Kabir's
6 investigator has gone to the house of the CHS in order to serve
7 a subpoena, which we understand is a subpoena for the pretrial
8 conference date. And in the process of doing so, because the
9 CHS was not at home, the investigator went to the door, banged
10 on the door. When he got no response, went to the windows and
11 banged on the windows, went away, and then came back later and
12 repeated this action. Which, needless to say, because the CHS
13 was not home, was very frightening to his family who was at
14 home, his wife who was at home.

15 So I raise this because, one, I think the actions --
16 and I have no reason to disbelieve them -- are both
17 inappropriate, in terms of how the effort was made to serve the
18 subpoena. But I query the propriety of even serving a trial
19 subpoena for a pretrial conference date. And I don't know why
20 that would be appropriate or why that would be happening.

21 So I'm raising this with the Court to see if there is
22 some clarity that I can get on this issue.

23 THE COURT: Mr. Aaron, do you know anything about
24 this?

25 MR. AARON: I do. We went and we served it, and the

11:18

11:18

11:18

11:18

11:19

1 informant has served. And one of the reasons is, we do
2 anticipate motions on that date. And if there are no motions,
3 we would like him to be ordered back. But we do anticipate
4 that there's going to be motions on that date.

5 THE COURT: On the pretrial conference date? 11:19

6 MR. AARON: Correct.

7 THE COURT: That will require the presence of -- tell
8 me what those motions would be.

9 MR. AARON: Well, we believe that there may be
10 additional motions regarding the entrapment defense and the 11:19
11 statements that he made to the other witnesses.

12 And if not, we wanted to make sure -- well, if there
13 are no motions, then obviously the informant can go on his way.
14 But if there are motions, we wanted to make sure that the
15 informant is going to be there. 11:19

16 THE COURT: Well, even if there's a motion by the --
17 first of all, I don't know -- I intend to rule that your client
18 is not entitled to raise an entrapment defense based on the
19 derivative entrapment issue.

20 So that would be my ruling. 11:20

21 So I don't know what other motion there could be with
22 respect to that. And I don't know what motion there could be
23 as to your client, that you would be subpoenaing the
24 confidential source to appear at the pretrial conference.

25 But if there is a need, can Government counsel accept 11:20

1 a subpoena for the confidential source?

2 MS. DEWITT: Your Honor, if that will prevent the
3 family from being harassed by defense counsel's investigator,
4 we will absolutely accept service on his behalf.

5 THE COURT: All right. Then let's do it that way.
6 If you feel there's a need, on the basis of any motions that
7 you file, then give the subpoena to Government counsel.

11:20

8 MR. AARON: Your Honor, again, I object to the
9 Government's characterization of the defense as harassing,
10 improper, or being illegitimate in any way.

11:21

11 THE COURT: Well, Mr. Aaron, if an investigator is
12 banging on the windows, that doesn't sound appropriate to me.

13 MR. AARON: We don't have any proof of that.

14 THE COURT: We don't. And I said *if*. If that's
15 happening, I don't think it's appropriate. So that's --
16 there's an easy solution here. Rather than -- don't you agree,
17 and isn't it easier and cheaper for the public defender's
18 office, rather than having an investigator spend the time to go
19 to the house, whatever he or she is doing, to give the subpoena
20 to the Government?

11:21

11:21

21 MR. AARON: Your Honor, I'm grateful that the
22 Government is willing to cooperate on that, and I wish they
23 were willing to cooperate on the other matters that I set forth
24 on my June 4th letter and my 16 discovery requests since
25 January 17 of 2014.

11:22

1 THE COURT: These hearings would be a lot shorter if
2 we could, as Judge Takasugi used to say, take the mustard off
3 the hot dog. Thank you.

4 MR. AARON: Your Honor, I had a couple more matters.

5 THE COURT: What else?

11:22

6 MR. AARON: My client is being held at CDC
7 temporarily now. But one of the problems that he has is when
8 he's being taken to CDC, he's not given a kosher diet. And as
9 a result, he doesn't eat. And he hasn't eaten for, what he
10 said, I think, four days.

11:22

11 So we would like, when he is brought to CDC, if the
12 marshal's office could contact and make sure that he gets the
13 kosher diet there.

14 THE COURT: All right. I'll follow up on that.

15 MS. DEWITT: Your Honor, I don't want to interrupt.
16 I generally tend to try to not get involved in those kinds of
17 issues, but the Bureau of Prisons has informed me, and they
18 actually asked if we would make sure that the Court know that
19 at MDC the reason Mr. Kabir's kosher -- his request for kosher
20 felafel food was denied is because he violated their rules in
21 the commissary, in ordering food that was prohibited for him
22 when he was on that diet. He not only did that once, but then
23 was warned, but then apparently did it repeatedly.

11:22

11:23

24 So I bring this to the Court's attention only because
25 before we just, you know, immediately assume that they're

11:23

1 somehow denying a defendant --

2 THE COURT: Well, I don't think it's a problem at the
3 MDC anymore. I don't think that's been the problem.

4 MR. AARON: Your Honor, we don't think that they're
5 doing this intentionally. We're not saying -- we're not 11:23
6 accusing them of any bad faith doing this intentionally. They
7 just don't know that he should be getting a kosher diet.

8 THE COURT: This is at the CD -- this is at San
9 Bernardino?

10 MR. AARON: Correct. 11:23

11 MS. DEWITT: But my point, Your Honor, is that it
12 actually is intentional. It's intentional by the defendant
13 because he is not following the rules, and he himself is not
14 keeping himself to that diet and, therefore, expects to be able
15 to break the rules of the institution. 11:24

16 I can't speak to CDC, but I know that that's true --

17 THE COURT: That may have been -- I just need to
18 focus on what I need to focus on.

19 That may have been an issue in the past. That issue
20 has now been resolved, and he is getting the kosher diet. And 11:24
21 I don't think there have been any more reports of rule
22 violations for some time.

23 Are you talking about something that's happened
24 recently?

25 MS. DEWITT: I'm not sure what the Court means by 11:24

1 recently, but I can say that it happened after the Court issued
2 an order.

3 THE COURT: Oh, it did?

4 MS. DEWITT: It issued an order for them to give
5 him -- and my understanding is, and I can get that further
6 information for the Court, or you can request it, but --

11:24

7 THE COURT: I will follow up on that. But I think
8 the issue right now is whether he's getting the kosher diet in
9 San Bernardino. And this doesn't relate to what's going on in
10 San Bernardino, does it?

11:24

11 MS. DEWITT: I can't speak to San Bernardino, except
12 I will say if he isn't willing and able to follow a kosher diet
13 at MDC, I'm not sure why he would be entitled to that at CDC.

14 But again, I don't really have a dog in this fight.
15 I just want to make the Court aware that that's -- that that's
16 why these actions have been taken, and it may be why it's been
17 taken at CDC too.

11:25

18 THE COURT: All right. What's the other issue?

19 MR. AARON: The other issue, Your Honor, is that I
20 had talked to the Government about this. I tried to reach some
21 sort of agreement with the Government, and the Government
22 suggested that we bring this issue to the Court.

11:25

23 The Government's estimate is 20 court days of trial.
24 So if we start on August 12th, that would be five weeks. That
25 would mean that the Government --

11:25

1 THE COURT: Six weeks. Four day trial weeks.

2 MR. AARON: Twenty court days.

3 THE COURT: Oh, I thought you said 24.

4 MR. AARON: I apologize. So that would mean that it
5 would end approximately on the 16th. 11:25

6 What I would like, Your Honor, is a date certain by
7 which I could subpoena witnesses for the defense because we
8 have some witnesses that may be coming from out of the country
9 or from out of state. And to have them come on August 12th and
10 have them wait five or six weeks is not reasonable. 11:26

11 THE COURT: I can give you a date certain that the
12 trial will start. I've done that.

13 In terms of when the Government's case would end, I
14 would suggest -- and I know you want to give your witnesses as
15 much notice as possible, but I would suggest that two weeks 11:26
16 into the Government's case, which would still give you about
17 three weeks notice for your witnesses, we'll probably be in a
18 better position to determine if the case is going more quickly
19 than expected.

20 MR. AARON: There's some out-of-state witnesses that 11:26
21 that would not be a problem, a witness notice that short.
22 There is some witnesses that are out of the country that we may
23 have to arrange with foreign governments where we won't have
24 that luxury. We would need more lead time than that.

25 THE COURT: How long do you think it's going to take 11:27

1 you to put on your case? A week? Two weeks?

2 MR. AARON: One week, four days.

3 THE COURT: Okay. Well, I don't know what to say,
4 other than your witnesses -- if you want to be on the safe
5 side, get them here a week before we think the Government's
6 case is going to end, in case it ends early.

11:27

7 MR. AARON: What I don't want to have happen is the
8 Government's case ends dramatically early and the Court says,
9 *You're not ready to proceed; you rest.*

10 The problem that we have is that some of these
11 witnesses are refugees from Afghanistan. They don't yet --
12 they are not yet nationals of any other country. They don't
13 have the same travel documents that a -- some of our foreign
14 witnesses have European union travel documents, and they can
15 get here in as short as two weeks notice. And others are
16 refugees, and I believe that we're going to have to talk to the
17 embassy and probably the host country to see if they will be
18 allowed to testify and return. But if so, I am certain we will
19 need more lead time.

11:28

11:28

20 THE COURT: Well, how --

11:28

21 MR. AARON: We probably need 30 days.

22 THE COURT: Then, you know, the best -- I mean, I
23 know that there is a lot of strategy in which order you put on
24 your witnesses. And if you think you're going to finish your
25 case in a week, that doesn't give you a lot of flexibility

11:28

1 about the order in which you call your witnesses to fill up
2 time. But --

3 MR. AARON: I would propose the following, Your
4 Honor --

5 THE COURT: Well, Ms. DeWitt, what's the shortest at 11:29
6 this point -- do you have any new information or a new estimate
7 as to the length of your case in chief?

8 MS. DEWITT: Unfortunately, Your Honor, I do not.

9 THE COURT: So your estimate is still 20 days?

10 MS. DEWITT: We're still going to make every effort 11:29
11 to make it shorter, but I think that's our best estimate at
12 this time.

13 THE COURT: Do you think there is any chance it's
14 going to be less than three weeks?

15 MS. DEWITT: No. 11:29

16 THE COURT: All right. So why don't you figure three
17 weeks, given it's probably going to take us a day -- well, it
18 probably won't take us more than a day to select a jury, given
19 that the parties have agreed for time qualification ahead of
20 time. So the panel that we get should more or less be time 11:29
21 qualified. There's still a lot of other issues, but I'm
22 optimistic we can pick the jury in a day, a full day.

23 So that gives us -- starting on maybe the second day
24 of the first week, why don't you plan for about three weeks,
25 Mr. Aaron. At the worst, then you'd have your witnesses 11:30

1 waiting around for a few days in Riverside, in August.

2 MR. AARON: So three weeks would be --

3 THE COURT: Early September.

4 MR. AARON: -- September 3rd. Would it make sense,
5 then, Your Honor, to have them come back that Monday,
6 September 9th?

11:30

7 THE COURT: I'm not --

8 MR. AARON: To have the witnesses available on
9 September 9th?

10 THE COURT: Because that would be three weeks?

11:30

11 MR. AARON: That would be three weeks and two days.

12 THE COURT: That sounds about right.

13 I mean, I'm not -- I'm not going to say you've
14 rested. I mean, if we have to take a couple of days off in the
15 middle of a long trial because there's an issue with witnesses
16 who -- well, I wouldn't do that to either side, if there are
17 issues with witnesses traveling who don't have -- who are
18 refugees.

11:30

19 MS. DEWITT: We're not going to object.

20 THE COURT: I've never done that, and I don't think
21 this is the trial where I'm going to begin.

11:31

22 MS. DEWITT: I would ask, Your Honor, though, that if
23 they are planning on these witnesses coming and they are going
24 to all this trouble, that maybe we can get some discovery as to
25 who they are and what they plan to testify to.

11:31

1 THE COURT: That sounds like a reasonable request.

2 MR. THOMAS: Your Honor, just one quick thing.

3 THE COURT: Yes.

4 MR. THOMAS: Your Honor, when Mr. DeLeon is
5 transported -- and, granted, this time they brought Mr. Kabir 11:31
6 to CDC and not my client, which was the opposite last time,
7 they don't let him travel with his discovery, and they don't
8 let him travel with his Quran. I e-mailed the marshals this
9 week about the proposed transport. They consented to allow
10 Mr. DeLeon to carry up to a couple inches worth of discovery, 11:31
11 so I got that issue covered. But for some reason, he still
12 can't carry the Quran. And I'm not aware of any of my
13 Christian clients that can't carry a Bible. So I'm just not
14 sure of the rationale behind a Muslim not being able to carry a
15 Quran. 11:32

16 THE COURT: I'll look into that.

17 MR. THOMAS: All right. Thank you.

18 THE COURT: Thank you for bringing that to my
19 attention.

20 All right. Thank you. 11:32

21 (Proceedings concluded)

22 -o0o-

23

24

25

C E R T I F I C A T E

DOCKET NO. EDCR 12-92 VAP

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and accurate transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

/S/ Phyllis A. Preston

DATED: June 12, 2014

Federal Official Court Reporter

CSR, FCRR